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MPCA COMMISSIONERS
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July 11, 2013

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Commissioner John Linc Stine
 Minnesota Pollution Control Agency
 520 Lafayette Road North
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RE: Wild Rice Standards Research and Mid-Project Review Event

Dear Commissioner Stine:

As you know, the Minnesota Chamber of Commerce ("Chamber") and Chamber members are actively participating in the Minnesota Pollution Control Agency ("MPCA") Wild Rice Advisory Committee ("Advisory Committee") and have been engaged for years with the MPCA and others to assess Minnesota's water quality standards for the protection of wild rice and the application of those standards. The MPCA has used the Advisory Committee meetings to gather input on MPCA research and its process to collect sulfate and wild rice data. More recently, the MPCA informed the Advisory Committee about MPCA's plan to go beyond research and data gathering to begin a process to assess waters of the State for compliance with the 10 mg/L sulfate standard in Minnesota Rules 7050.0224 ("Wild Rice Rule"). MPCA staff said that the information will be used to list waters that do not meet the standard as "impaired" under Section 303(d) of the Clean Water Act.

The Chamber has discussed the impaired waters assessment and listing process with you and your staff in the past and is disappointed that the MPCA has developed a plan to proceed. The process proposed by MPCA staff is contrary to the Wild Rice Rulemaking and Research statute¹ ("Wild Rice Rulemaking Statute") drafted with the MPCA, passed by the Legislature, and signed by Governor Dayton in 2011, and is premature at this time. We respectfully request that you instruct your staff to suspend the assessment and listing process until the MPCA has completed the wild rice research and rulemaking process required by law.

The Wild Rice Rulemaking Statute requires the MPCA to initiate a process to amend the Minnesota Rules, chapter 7050 to:

1. Address water quality standards for waters containing natural beds of wild rice, as well as for irrigation waters used for the production of wild rice;
2. Designate each body of water, or specific portion thereof, to which wild rice water quality standards apply; and

¹ Laws of Minnesota, 2011 First Special Session, Chapter 2, Article 4, Section 32.

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3. Designate specific times of year during which the standards apply.

However, the Legislature made clear that the process to amend chapter 7050 was to begin only “[u]pon completion of ... a wild rice research plan” Only after this research is completed can the MPCA address the wild rice water quality standards, designate the water bodies to which the standards would apply, and designate the times of year the standard would apply.

Further, the Legislature expressly directed the MPCA to ensure that the regulated community would not have to dedicate funds and other resources to reducing sulfate discharges *prior* to chapter 7050 being finally amended. The statute directs the MPCA to exercise its authority under federal and State laws and regulations to ensure, to the fullest extent possible, that no permittee is required to expend funds for design and implementation of sulfate treatment technologies.²

By listing waters as sulfate-impaired and imposing the 10 mg/L discharge limit in National Pollutant Discharge Elimination Systems (“NPDES”) permits, the MPCA is doing what the Legislature told it *not* to do: (a) declare new rules regarding wild rice water quality standards, and where and when those standards will apply, *prior* to completing the statutorily required scientific studies; and (b) cause permittees to expend funds for design and implementation of sulfate treatment technologies *prior* to the rule amendments to chapter 7050 being adopted.

It is also clear that the MPCA’s actions require formal rulemaking procedures. The MPCA’s stated intentions to add “wild rice impaired” waters to its 303(d) list and the imposition of 10 mg/L sulfate discharge limits to those waters of the State qualify as rules under the Minnesota Administrative Procedure Act (“APA”). These are “agency statement[s] of general applicability and future effect, including amendments ... adopted to implement or make specific the law enforced or administered by that agency” and, therefore, require formal rulemaking. Minn. Stat. § 14.02, subd. 4. And, as stated above, the Legislature specifically told MPCA that it must engage in rulemaking to amend the Wild Rice Rule.³

There are other significant problems with the MPCA’s actions beyond its failure to comply with the Wild Rice Rulemaking Statute. Importantly, the MPCA has not established the required connection between classifying waters as “wild rice waters,” for 303(d) purposes and the 10 mg/L sulfate limit to protect that designated use.

A water body must be designated for a particular use before the criterion needed to protect that use can be applied. 40 C.F.R. § 131.2. For example, Minnesota rules provide for specific water quality standards for Class 2 waters of the State for the use of “aquatic life and recreation.” Minn. R. 7050.0222. The numeric and narrative criteria to attain these water quality standards are also identified. *Id.* Thus, there is a clear process for designating uses and associated criteria that allows transparency and predictability for dischargers.

² *Id.* at Section 32(e).

³ The Legislature was clear that before implementing standards as to waters containing natural beds of wild rice, a rulemaking was required. Laws of Minnesota, 2011 First Special Session, Ch. 2, Article 4, Section 32(a), (b). The current regulations only apply to production water and should not apply at all to waters containing natural beds of wild rice.

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Here, since the Wild Rice Rule and its 10 mg/L standard were adopted without considering what waters it would apply to; that connection has *never* been made. The MPCA needs to obtain updated science and engage in formal rulemaking to establish and apply the standard.

In addition, under the Clean Water Act and its regulations, designated uses need to be “attainable.” Water quality standards “should, *wherever attainable*, provide water quality for the protection and propagation of fish, shellfish and wildlife” *Id.* (Emphasis added.) In addition, each state “must specify appropriate water uses to be *achieved* and protected.” 40 C.F.R. § 131.10(a) (emphasis added). MPCA’s rules also recognize an element of attainability associated with its state water quality standards. *See* Minn. R. 7050.0150, subp. 1 and Minn. R. 7050.0405, subp. 1.

Here, the MPCA has made no showing that the wild rice designated use is attainable for the waters where it is trying to apply the historical 10 mg/L sulfate limit. Thus, MPCA’s proposed 303(d) listings and its imposition of a 10 mg/L sulfate discharge limit fails to meet the federal and State requirements outlined above. And, significantly, the imposition of the standard itself may not make the use attainable.

Finally, the Chamber urges you to recognize the substantial real-world impacts of MPCA’s proposed actions with regard to the Wild Rice Rule. MPCA’s guidance states that “the possible erroneous placement of a waterbody on the 303(d) impaired list is a concern because of the regulatory and monetary implications of 303(d) listing.”⁴

One of these implications is the application of antibacksliding. Under Minn. R. 7053.0275, imposing the 10 mg/L numeric limit in current NPDES permits is highly problematic in that antibacksliding prohibitions may prevent such limits from *ever* being increased, even if the scientific studies mandated by the Legislature establish that the limit should be substantially above 10 mg/L.

In a similar vein, once the MPCA puts stringent limits into NPDES permits, an increase in those limits may be subject to antidegradation review and, as a result, could be prohibited. *See* Minn. R. 7050.0185, subp. 1.

Permit holders would suffer the real-world impacts of being obligated to spend millions of dollars to attempt to reduce sulfate discharges. Antibacksliding and antidegradation rules could prohibit these limits from ever being increased, even if clearly justified by the data derived from the new sulfate studies. This is exactly the result the legislature sought to avoid in the Wild Rice Rulemaking Statute.

The MPCA and the public will clearly benefit from adherence to the process mandated by the Wild Rice Rulemaking Statute. The required formal rulemaking will allow the MPCA and interested parties to establish a process to designate waters subject to wild rice water quality standards based on modern, reliable scientific evidence. The rulemaking process provides the

⁴ Guidance Manual for Assessing the Quality of Minnesota Surface Waters for Determination of Impairment: 305(b) Report and 303(d) List, 2012 Assessment Cycle, *wq-iw1-04*, December 2011

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appropriate opportunities for the MPCA to interact with interested parties and reach sound decisions consistent with the APA.

We respectfully request that you direct your staff to follow the process established in the Wild Rice Rulemaking Statute prior to moving forward with its intention to assess waters for 303(d) listing. That process is not only required but will also produce a better result for the State of Minnesota. The Chamber and its members will continue to work with you and your staff as the process proceeds.

Thank you for your prompt attention to this matter.

Very truly yours,

WINTHROP & WEINSTINE, P.A.



Lloyd W. Grooms